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Issue Date: 19 November 2013

DATE:

CASE NO: 2012-STA-00051

In the Matter of:

CHUCK BALL,
Complainant,

v.

NORTH COUNTRY OIL,
Respondent.

DECISION AND ORDER
DISMISSING CLAIMS

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” or “STAA”), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. My evaluation of the evidence has been guided by the principle that the proponent of a rule bears the burden of persuasion. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994)(citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

PROCEDURAL BACKGROUND

Anthony “Chuck” Ball started work with North Country Oil, Inc. (North Country) on November 28, 2011. Mr. Ball was hired as a hydro-vac operator, frac heater operator, and CDL driver. In simple terms, Mr. Ball drove a large truck with a piece of equipment on the back to an oil field where he operated the equipment. When operating a hydro-vac, he would be required

to dispose of the collected waste material. After the work was completed, he returned, with the equipment, to the North Country facility. (Tr. at 32, 36, 41). Mr. Ball was terminated by North Country on January 9, 2012.

Three witnesses testified during the hearing. First Mr. Ball, the complainant, testified. He discussed his job with North Country, outlining his duties and providing some background about his understanding of the industry and North Country. He described his view of a conversation with Matt Quillin, one of the supervisors at North Country Oil, that took place on January 7, 2012 in a ride from the North Country facility to Minot, ND. He described an incident that took place on January 8, 2012; and he described his personal interactions with a co-worker, Morris Jacinto.

The second witness was Matt Quillin. He discussed his understanding of the January 8, 2012 incident after he talked to Mr. Jacinto and another worker about the events. He discussed the January 7, 2012 conversation with Mr. Ball during the ride to Minot, and he discussed his conversation with the two workers during which he discovered the abuse of Mr. Jacinto by Mr. Ball. Mr. Quillin detailed the reasons for terminating Mr. Ball.

Finally, Mr. Jacinto testified. He discussed, through a translator, his personal interactions with Mr. Ball.

Mr. Ball's Testimony

Mr. Ball claims that on January 7, 2012 he joined Matt Quillin, the superintendent for North Country who was in charge of the maintenance shop, on a trip to Minot, ND. Mr. Ball testified that his purpose for going on the trip was to tell Mr. Quillin "about what was going on." (Tr. at 40). Mr. Ball testified that he told Mr. Quillin that he did not get a 30-day performance review as promised, and that he was not getting enough hours, possibly because he told another supervisor that he would not dump waste material in a temporary storage pit dug by Northern Oil. Mr. Ball claimed the pit was not an approved/permitted dump pit. (Tr. at 37-38, 42-43).

Mr. Ball stated that he was not complaining but rather informing Mr. Quillin "that I was upset at some of the things going on." (Tr. at 45). He indicated that he told Mr. Quillin that there were some safety issues, including what he claims were improper procedures for cleaning waste storage tanks at well locations. (Tr. at 46-47). He also stated that he told Mr. Quillin that one of the frac heater trucks was not heating the tank correctly.

One of the trucks had a really bad habit. It would – it would be running well and then all of a sudden flames would just start shooting out of the top of the box, maybe 10, 15 feet high out of the top of the box. I wouldn't describe it as balls of fire. They were flames. It's – it's like a gas grill that would take off on you and flame up.

(Tr. at 48). When asked if he complained to Mr. Quillin about mechanical issues with the trucks, Mr. Ball responded "I don't – I'm sure I did. I can't give you specifics, . . ." (Tr. at 49).

When ask why he believes he was terminated Mr. Ball stated:

I strongly believe that I was terminated for bringing up the issues that I brought up on that Saturday with Mr. Quillin. There's no doubt in my mind. And the previous week before when I had refused to dump in the pit.

(Tr. at 51). On cross examination, Mr. Ball clarified what he discussed with Mr. Quillin. He noted that he "actually never mentioned the pit to Matt [Quillin]." (Tr. at 67-68). He mentioned to Mr. Quillin that he heard about "other drivers dumping waste in places that I heard they weren't supposed to dump it." (Tr. at 68). He complained that he did not have his 30-day review so that he could get an hourly rate increase. He also stated that he talked to Mr. Quillin

about a wide range of things, and the mechanical condition of the trucks, the hydro-vacs leaking waste, the flames on the burners, the – the frac heaters not burning correctly. I talked to him about all of that.

(Tr. at 70).

Mr. Ball testified about his recollection of an incident that took place on January 7 and 8. At approximately 8:00 PM on the evening of the 7th, Mark Semm, Mr. Ball's supervisor, notified the drivers that there was a job and they would be taking "both vac trucks out and that everybody was going out." (Tr. at 54). Mr. Ball thought it unusual that they were sending both trucks. There apparently was some "grousing" about this among the workers. When the trucks left the following morning, Mr. Ball drove a crew truck, not a vac truck. (Tr. at 55). Apparently, Mr. Ball previously developed the reputation that he did not want to drive the hydro-vac truck. However, he testified that wasn't true:

I had never said that. What I had said is that I'd rather run the frac heater. And so generally, in fact, a high degree of the time – I'd say 95, 96, 97 percent – I didn't go out on hydro-vac jobs. I ran frac heaters when they're – when there were jobs to heat up.

So it was kind of a – well, it was very unusual to send me out, especially, on a job since both frac-heating trucks were sitting in the shop.

(Tr. at 55-56). Mr. Ball was still on location at approximately 5:30 PM; there were only four workers from North Country left at the site. Mr. Ball stated that he found the invoice for the job in his crew truck. There was a note on the invoice telling him to finish filling in the invoice and get it signed by the representative of the company for which they were doing work. Mr. Ball helped the crew of the last truck set up for cleaning an open tank. He then completed the form and got it signed while the other crew completed its job. (Tr. at 72-73). The vac truck needed to dump what it collected prior to returning to the North Country facility. "The disposal site was one way, away from the shop, maybe a half hour, 40 minutes from where we were. Our shop was maybe a half hour, 40 minutes the other way." (Tr. at 73-74).

Mr. Ball decided he was going back to the shop; he “didn’t see any sense in following them out there with the crew truck” (Tr. at 74). According to Mr. Ball, the driver of the vac truck was “real agitated,” wanting to see the invoice. The other driver was “throwing a fit and beating on the truck door . . . yelling about the invoice.” (Tr. at 74). Mr. Ball told him he wasn’t going to give the invoice to him because Mr. Ball had gotten it signed. Mr. Ball continued that “instead of wasting the time and two more guys running back out there to watch them empty out a truck - - there was nothing for us to do -- I told him, ‘I’m going back to the shop.’” (Tr. at 74-75). The vac truck driver then told Mr. Ball to follow him to the disposal site, Mr. Ball said “No. I’m going back to the shop.” Mr. Ball drove away and the vac truck driver “started running at me and picking up rocks, scoria rocks, about two inches in diameter, chunks, and throwing them at the truck and throwing them at us.” (Tr. at 75-76). Mr. Ball denies the rumor among the employees that he did not follow the vac truck and returned directly to the shop so that he could watch a football game. (Tr. at 78).

Mr. Ball also testified about his interactions with Morris Jacinto. Despite accusations otherwise, Mr. Ball testified that he did not throw cigarettes or trash at Mr. Jacinto when in the truck. (Tr. at 62). When asked if he ever “laid [his] hands on [Mr.] Jacinto,” Mr. Ball responded “Not the way you characterize it.” The follow up question was “How did you lay your hands on him?” To which Mr. Ball responded “I don’t know if I ever did, sir.” (Tr. at 64). Mr. Ball acknowledged that he could have patted him on the back at some point in time. (Tr. at 64-65).

Mr. Ball was asked whether he ever complained about Mr. Jacinto’s weakness in the English language. “No, I didn’t, but I’d be glad to explain where that came from” (Tr. at 62). Mr. Ball’s explanation:

Sir, we were -- I did -- we did have a conversation with Morris and several other guys that were there. I think it might have been -- I don’t think I really knew him in the first week I was there. But in the second week we were there, we were sitting around eating and talking and we were having a general discussion about life and working and doing different things. And I’m not even sure how the subject came up, but, yes, I did express to them, and it wasn’t in an unkind way --

I want to say I’m pretty angry at being accused and painted as something that you’re trying to paint me with. I -- they didn’t speak real good English. I -- several times -- or at least sometimes they expressed that, some of the guys. Some of the guys spoke excellent English. Some of the guys didn’t speak such good English. They could express themselves. It might not be with the right words, or when you talk to them, they might not understand exactly what you were saying.

(Tr. at 62-63). Mr. Ball continued:

I had helped Morris. I had helped several of the other guys with their timecards, and it was during that discussion that I tried to tell them, “You come to the United States and work, you’re way better off knowing and

understanding English so you can understand what you're getting paid, so you can understand what you're doing, so you don't get taken advantage of." And I used the illustration that if I were to go to Mexico or El Salvador and I didn't speak Spanish, where would I be? What opportunities would I have? What would I understand? It was --

It was a kind conversation.

(Tr. at 63). Mr. Ball was aware that his suggestion was not well received:

And they took -- one of them did take exception to it, and I'm not sure who it was, if it was Jose' got upset because I suggested that if -- if they're going to assimilate to our country, that they're way better off knowing English and understanding our language and being able to speak it. There's more opportunity. They're not going to get ripped off. They're not going to get taken advantage of. That's the context that was in.

(Tr. at 63-64).

Mr. Ball discussed the meeting on January 9 with Mr. Quillin in which Mr. Ball was terminated.

It was a very awkward situation, at least for me, and I think it was for him, and I'll again express, I was shocked when I walked in there because I -- I thought Matt [Quillin] was a good guy. But when he told me something about basically abusing Morris [Jacinto] and that he had gotten a different story on an incident that happened on Sunday, I was -- I was completely flabbergasted.

(Tr. at 71).

Mr. Quillin's Testimony

Mr. Quillin is a superintendent for North Country Oil and Vazzana Underground (another company owned by the owner of North Country). He has worked for Vazzana for approximately 18 years and North Country for two years. At North Country he runs the shop and does other "general stuff." (Tr. at 85, 87). Mr. Quillin is the individual who terminated Mr. Ball.

Mr. Quillin was tasked with determining the story surrounding the January 8 incident in which Mr. Ball decided to return to the shop rather than follow the vac truck to the waste dump facility. Mr. Quillin was aware of both versions of what happened; Mr. Ball's version that the vac truck driver, Aaron, threw rocks at the truck and Aaron's version that Mr. Ball was not going to follow him to dump the load but that there was no rock throwing. Aaron had been instructed that Mr. Ball was to follow the vac truck to the dump site because Mr. Ball was in training and needed to learn the proper dump procedures. In addition, the company would have the crew truck accompany the vac truck "for safety reasons." (Tr. at 97).

Mr. Quillin met with two laborers who were at the work site who said “they didn’t see any rocks being thrown at the truck, they didn’t hear . . . any rocks hitting the truck, no -- nothing that Chuck [Ball] described was correct.” (Tr. at 89).

During the interview with the laborers, Mr. Jacinto left the office and the other laborer told Mr. Quillin that Mr. Jacinto had been physically abused by Mr. Ball, including being slapped and “stuff being thrown at him across the truck.” (Tr. at 89). When Mr. Jacinto returned to the office, he confirmed the report.

When questioned about Mr. Ball’s complaints concerning Mr. Jacinto’s English proficiency, Mr. Quillin responded: “Yeah. Yeah, I guess, Yeah, that -- that’s right.” (Tr. at 91). When further questioned about his hesitancy, he stated “Well, I -- I -- I believe they did say something about it, but I -- I focused, and I was -- my concern was the abuse.” (Tr. at 91). The abuse was a factor in Mr. Quillin’s decision to terminate Mr. Ball. (Tr. at 92).

Mr. Quillin also discussed the conversation Mr. Ball had with him during the ride to Minot on January 7. When informed that Mr. Ball “stated that he had a conversation with you where he talked about complaining to you about his lack of hours, not getting his 30-day review period, that he was upset about some illegal -- of maybe some dumping issues,” Mr. Quillin responded: “No sir. . . . Well, I recall the -- the trip to Minot, but that’s not what we discussed.” (Tr. at 93).

“What was discussed?”

“Just that he thought the company was being mismanaged . . . and that he thought that the hours were being divided amongst the guys unfairly. He thought there was favoritism, but that was the gist of the -- the conversation.”

“Okay. So he was upset about management of the company?”

“Yes, sir.”

“And did he ever complain to you about his -- his lack of hours?”

“No.”

“Did he complain to you about his not getting a 30-day review period?”

“No.”

“Did he complain to you about any safety issues on -- on the trucks?”

“No.”

“Did he complain to you about the frackers not burning correctly and leaking oil?”

“No.”

Did he ever make any of these complaints to you?”

“No.”

(Tr. at 93-95).

Mr. Quillin was asked what factors he relied on in terminating Mr. Ball. He responded: “The incorrect information he had supplied to us in the occurrence that happened that night [January 8] and the abuse against Morris.” (Tr. at 105).

Mr. Jacinto’s Testimony (Mr. Jacinto testified through a translator.)

Mr. Jacinto testified that he knew and worked with Mr. Ball. Mr. Jacinto stated the Mr. Ball got angry with him because he didn’t speak English. Mr. Jacinto also testified that Mr. Ball would throw cigarette butts and other trash at Mr. Jacinto. According to Mr. Jacinto, Mr. Ball would slap Mr. Jacinto, mostly on his back, but on at least one occasion Mr. Ball slapped Mr. Jacinto on his face. Mr. Jacinto discussed these issues with Mr. Quillin. (Tr. at 128-29).

On March 10, 2012, Mr. Jacinto signed a statement, in English that was translated from Spanish. (Tr. at 132). This document reiterates that Mr. Ball did not want to work with Mr. Jacinto because he doesn’t speak English. The statement also discusses Mr. Ball throwing trash at Mr. Jacinto. Finally, Mr. Jacinto details Mr. Ball’s slapping.

He always slaps me on the shoulder when he tells me exactly what he wants me to do. Example: “Listen go get the shovel, squeegee, or 6” hose, and he would slap me very hard on the shoulder left or right depending on what side he was on. One time instead of slapping me on my shoulder he slapped me on the left side of my face with the back of his hand.

(RX- 3 at 17).

ISSUES

North Country Oil does not dispute that it is an employer, and Mr. Ball was an employee, under the provisions of the STAA. However, North Country Oil questions whether Mr. Ball engaged in protected activity under the STAA; specifically whether Mr. Ball notified the company of the alleged safety issues. Furthermore, even if Mr. Ball engaged in protected activity, North Country Oil disputes that Mr. Ball’s termination was motivated by any such alleged protected activity.

DISCUSSION

Mr. Ball, in his brief, again raised the issue of the timeliness of North Country Oil’s

response to “Complainant’s First Set of Interrogatories, Requests for Production of Documents, and Request for Admission.” This question had been raised during the hearing.

MR. McDONALD: Well -- well, there are some deficiencies in the discovery, but primarily with the admissions, they are late, and by 29 C.F.R. 18.20, if -- if they’re 31 days, you know, late, they are deemed admitted. And --

JUDGE REILLY: Under the regulations, you are correct, but if we go down to -- and here’s how I see it happening. I’m going to let you know up front how I see this going down today.

You’re going to make the motion and under 18.20 I’m going to admit it. And then under 18.20(e), Mr. Omdahl’s going to ask that they be withdrawn.

(Tr. at 12-13). Mr. McDonald acknowledged that I would allow the withdrawal of the deemed admissions. When asked “do we want to go through the exercise or do we just want to -- to --”, Mr. McDonald responded: “We can just go forward.” (Tr. at 13). Based on this exchange, I find that Mr. McDonald withdrew the request for admissions.

Furthermore, when asked what prejudice Mr. Ball faced because of this, Mr. McDonald responded:

we did face prejudice in that we had a very tight time frame for getting all of discovery done. . . . So not having discovery until, on a holiday weekend, a few days before the hearing did prejudice us in -- in the -- in the fact that we didn’t have much time to review it. We didn’t have much time to raise objections. We didn’t have much time to follow up on that discovery.

(Tr. at 13-14). The parties were given the opportunity for post-hearing depositions but failed to conduct any depositions. Therefore, I find there was no prejudice.

Finally, in his brief, when he raises the question of admissions, Mr. Ball makes clear that he “served ‘Complainant’s First Set of Interrogatories, Requests for Production of Documents, and Request for Admission’ by facsimile and E-mail.” (Complainant’s Brief at 1). Mr. Ball ignores the regulation limiting the method for serving a document on another party. “Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address.” (29 C.F.R. § 18.3(b)). Under the regulations, Mr. Ball did not properly serve the requests on North Country Oil. Therefore, I find that because service was not properly effectuated, North Country Oil’s responses cannot be deemed late.

Statement Of The Law

The Complainant's Complaint under the STAA

The employee protections of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1) (“the STAA”), provide that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle regarding pay, terms or privileges of employment because the employee has engaged in certain protected activity. The protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp.*, Case No. 1991-STA-34, (Sec’y., July 24, 1992), slip op. at 4. A “commercial motor vehicle” includes “any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. § 2301(1).

The Act further provides protection for employees who have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. 49 U.S.C. § 31105(a)(1)(B)(ii). Whether an employee’s apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec’y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

As noted above, the STAA prohibits discharge, discipline, or discrimination against an employee because the employee has filed a complaint related to a violation of commercial vehicle safety or security regulations. 49 U.S.C. § 31105(a). In an STAA proceeding, the general burden of proof is on the Complainant, who must establish by a preponderance of the evidence that the employer discriminated against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007). The protected activity need only be a contributing factor to the employer’s decision to terminate the Complainant. 29 CFR Part 1979.109(a) (“A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.”). Thus, at this stage of the proceedings, Complainant must show (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at p. 6; *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008- STA-052, slip op. at 5 (ARB Jan. 31, 2011). If he does so, the Respondent may escape liability only by showing by clear and convincing evidence that it would

have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren, supra*, slip op. at 12 (ARB Feb. 29, 2012).

Specific prohibitions include:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition

49 U.S.C. § 31105; *see* 29 C.F.R. § 1978.102.

Under 49 U.S.C. § 31105(a)(1)(A)(i), “[p]rotected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant’s belief must be objectively reasonable.” *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). Likewise under 49 U.S.C. § 31105(a)(1)(B)(i), a complainant is required to show only that he had a reasonable belief that operation of the vehicle would violate a regulation, order, or standard relating to commercial motor vehicle safety, health, or security. *Brown v. Wilson Trucking Co.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 1 (ARB October 25, 1996). The ARB has recently held that “the reasonableness of [a refusal to drive under (a)(1)(B)(i)] must be subjectively and objectively determined.” *Ass’t Secy’ & Bailey v. Koch Foods, LLC*, ARB No. 10-101, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sep. 30, 2011).

Mr. Ball has the burden of proof. To prevail he must show:

(1) that he engaged in protected activity;

- (2) that North Country Oil took an adverse employment action against him; and
- (3) that his protected activity was a contributing factor in the adverse employment action.

Based upon Mr. Ball's demeanor and his answers to questioning, I find that Mr. Ball's testimony at the hearing was not credible. Also contributing to Mr. Ball's lack of credibility is Respondent's Exhibit 3. This includes an expletive filled diatribe sent to Mr. Vazzano, owner of North Country Oil. Parts of this exhibit are threatening and accusatory. One statement references "my notes, copies of North Country invoices, directives and other records" as well as "hundreds of photos." (RX-2 at 8). None of these items were entered into the record. This exhibit was not challenged by Mr. Ball. I rely on it not for the truth of what it contains but rather as another example of Mr. Ball's proclivity for overstatement and even outright dishonest and threatening statements.

PROTECTED ACTIVITY

Mr. Ball alleges two types of activities that could qualify as protected activity under the STAA. The first is the safety issues with the trucks and the other is the dumping of frac fluids in a pit on North Country Oil property.

Safety Issues

Included with the truck issues are Mr. Ball's allegations that employees of North Country Oil clean tanks from the inside without any protective equipment, exposing the employee to potentially hazardous substances. (TR. at 46-47). Mr. Ball testified that "it was one of the things that I mentioned to" Mr. Quillin on January 7. Mr. Quillin testified that Mr. Ball never made this complaint to him. (Tr. at 94-95). Giving Mr. Ball the benefit of the doubt that tanks were cleaned as Mr. Ball indicated, there is no credible evidence that Mr. Ball discussed this issue with North Country Oil. Therefore, I find that there is no protected activity relating to the cleaning of the tanks.

Mr. Ball raised the issue with flames "shooting out of the top" of the frac heater on the truck. (Tr. at 48). He also complained about leaks on the hydro-vac trucks. During his testimony about what he told Mr. Quillin, he was asked specifically if he made "any complaints about mechanical issues with the trucks," Mr. Ball responded: "I don't -- I'm sure I did. I can't give you the specifics, but, I mean, there's" (Tr. at 49). On cross-examination, Mr. Ball was more definitive about his discussion with Mr. Quillin: "I talked to Matt [Quillin] about a wide range of things, and the mechanical condition of the trucks, the hydro-vacs leaking waste, the flames on the burners, the -- the frac heaters not burning correctly. I talked to him about all of that." (Tr. at 70).

Again Mr. Quillin testified that Mr. Ball did not raise these issues. "No, sir. . . . Well, I recall the -- the trip to Minot, but that's not what we discussed." (Tr. at 93).

"Did he complain to you about any safety issues on -- on the trucks?"

"No."

“Did he complain to you about the frackers not burning correctly and leaking oil?”

“No.”

“Did he ever make any of these complaints to you?”

“No.”

(Tr. at 94-95).

As I noted above, I do not find Mr. Ball to be a credible witness, therefore, I give greater weight to Mr. Quillin’s testimony. As such, I do not find any credible evidence that Mr. Ball discussed with North Country Oil the alleged safety issues he raised at the hearing. Therefore, I find that Mr. Ball did not engage in protected activity concerning safety issues with the trucks.

Dump Pit Question

Mr. Ball testified that on one occasion he was given a hydro-vac assignment that included disposing the collected waste fluids in a disposal pit at the North Country Oil facility. Before this assignment, he had never personally had to dispose frac fluids while working for North Country Oil. (Tr. at 44). Mr. Ball admitted “I didn’t have much experience at it. I didn’t have any experience at it, really. I’d been shown how to use the trucks a couple times.” (Tr. at 45). Mr. Ball indicated that he understood that the waste “is supposed to be treated, disposed of in places that are regulated by the State.” His understanding came from having worked for other companies and with other drivers that disposed of production waste. (Tr. at 42). He admitted that he had no experience hauling fluid production waste. (Tr. at 43). Mr. Ball acknowledged that a company could get a permit to build a pit for temporary storage of this type of liquid waste. (Tr. at 43). Mr. Ball received this hydro-vac assignment and was told he would dispose of the liquid in the pit out back. (Tr. at 38, 42). Mr. Ball testified he said “I’m not dumping there.” (Tr. at 38). Mr. Ball stated that he was told: “If you don’t dump there, you don’t work.” Another driver was sent on the job. (Tr. at 38).

There is no evidence in the record to indicate if the dump pit at the North Country Oil facility was permitted or not. Mr. Quillin testified that he thought the pit was legal, (Tr. at 107), but admitted he did not check the regulations, nor did he know if the pit was permitted. (Tr. at 109). There is insufficient evidence to determine if Mr. Ball would have violated the law by dumping frac fluid into the pit at the North Country Oil facility. Whether he would have violated the law is not material to the question. Under 49 U.S.C. § 31105(a)(1)(A)(i), “[p]rotected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant’s belief must be objectively reasonable.”

Mr. Ball’s refusal to dump the frac fluids involves a potential violation of the regulations concerning illegal dumping. Therefore, element one of the definition of protected activity is met. Element two is also met because I find that Mr. Ball had an “objectively reasonable” belief

that dumping frac fluid at the North Country Oil pit was illegal. I want to make clear that I am not finding the pit was illegal nor am I finding that Mr. Ball's actions would have been illegal had he dumped the fluid in the pit.

Because Mr. Ball's refusal to dump frac fluid in the pit at the North Country Oil met the two elements of "protected activity," I find Mr. Ball's refusal to dump the frac fluid is protected activity.

ADVERSE ACTION

On January 9, 2012, North Country Oil terminated Mr. Ball from his employment. That is an adverse employment action as defined by the STAA.

RELATIONSHIP BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION

In order for Mr. Ball to prevail, he must demonstrate that his refusal to dump frac fluid into the North Country Oil dump pit was a contributing factor in his termination. Mr. Ball has not met his burden.

Mr. Quillin terminated Mr. Ball on January 9, 2012. (Tr. at 88). Mr. Quillin testified that there were two factors considered in the decision to terminate Mr. Ball. The first factor was the incorrect information provided by Mr. Ball about the "rock throwing" incident on January 8, 2012. (Tr. at 105). After investigating that incident, Mr. Quillin testified that "nothing that Chuck [Ball] described was correct." (Tr. at 89). Specifically, Mr. Quillin called it "lying." (Tr. at 105). The second factor relied on by Mr. Quillin was Mr. Ball's physical abuse of Morris Jacinto. (Tr. at 105). This included very hard slapping and throwing things at Mr. Jacinto. (Tr. at 89-90).

Mr. Quillin testified that Mr. Ball did not raise with him the issue of illegal dumping and Mr. Ball admits that he "actually never mentioned the pit to Matt [Quillin]." (Tr. at 67-68). The only protected activity that Mr. Ball engaged in was the refusal to dump in the pit and Mr. Ball never discussed the pit or the refusal to dump with Mr. Quillin. Because Mr. Quillin was the individual who decided to terminate Mr. Ball, (Tr. at 88), there is no relationship between Mr. Ball's refusal to dump in the pit and his termination. Therefore, Mr. Ball's claim that North Country Oil terminated him in violation of the Surface Transportation Assistance Act, because he complained about safety and other regulatory violations, fails.

ORDER

For the foregoing reasons, the complaint of Chuck Ball is **DISMISSED**.

SO ORDERED.

STEPHEN M. REILLY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).